

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0335, Nelson S. Bolding, Executor of the Estate of Beverly Bolding v. Marjorie Huntoon & a., the court on March 22, 2007, issued the following order:

The plaintiff, Nelson S. Bolding, Executor of the Estate of Beverly Bolding, appeals an order of the trial court awarding attorney's fees to defendant Marjorie Huntoon. He argues that: (1) the award constituted an unsustainable exercise of discretion; (2) Huntoon was neither a party to the case at the time of the award nor a prevailing party; and (3) the court erred in failing to provide an opportunity for him to contest the reasonableness of the fees. We affirm and remand.

We review a trial court's award of attorney's fees under an unsustainable exercise of discretion standard, giving deference to the trial court's decision. LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270, 274 (2003). To be reversible, the trial court must have exercised its discretion for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. *Id.* If there is some support in the record for the trial court's determination, we will uphold it. *Id.*

An award of attorney's fees must be based upon statute, agreement between the parties or an established exception to the rule that each party is responsible for paying its own counsel fees. *Id.* at 276. One exception exists where a claim is patently unreasonable, that is, it is commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence or any reasonable claim in law as it is, or as it might arguably be held to be. *Id.*

Having considered the record before us, including the findings by the special master concerning the unreasonableness of the claim and the oral argument of the parties, we conclude that Huntoon was a prevailing party and affirm the decision of the trial court. See Appeal of Brown, 143 N.H. 112, 119 (1998) ("prevail" defined as "to be or become effective or effectual: be successful"). We remand this case to the trial court for final review of an award of reasonable attorney's fees to Huntoon.

Issues raised in the notice of appeal but not briefed are deemed waived. Miner v. A&C Tire Co., 146 N.H. 631, 634 (2001).

Finally, we grant Huntoon's request for an award of reasonable attorney's fees incurred on appeal. See Sup. Ct. R. 23. On or before April 23, 2007, Huntoon shall file an itemized statement of her attorney's fees. The plaintiff may file a response to the itemized statement on or before May 7, 2007.

Affirmed and remanded.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**